

June 16. 1767.

19 June 1767

Unto the Right Honourable the Lords of Council and Session,

To see

22 July 1767

T H E
P E T I T I O N
O F

Alter. and
Find as the L^d of
Ord^y had done

ALEXANDER CUNNYNGHAME

clerk to the Signet,

Humbly sheweth,

THAT in the question between the creditors of the deceased Michael Ancrum merchant in Edinburgh and the petitioner, the Lord Auchinleck Ordinary, of this date, pronounced the following interlocu-
tor. "With respect to the articles of superintromission in-
" fisted on by the objectors, finds, That as it has been fixed
" by judgement in the last resort, that Alexander Cunnyng-
" hame and Michael Ancrum were in copartnery, Cunnyng-
" hame's granting receipts, as factor for the trustees, of sums
" which he had right to receive in the character of surviving
" partner, but which character he was then contending did
" not belong to him, will not preclude him, now that he has
" been found a partner, from recurring to his proper and le-
" gal character of partner, and have the privileges thence a-
" rising; and as the first objection on this head seems to lean
" on the contrary supposition, repels the same," &c. To
which, upon a representation and answers, his Lordship ad-
hered.

* A

That

That the creditors preferred a reclaiming petition against these interlocutors, to which the petitioner having put in answers, your Lordships ordered memorials, and thereafter pronounced the following interlocutor, which reverses the judgments of the Lord Ordinary. "Find, That Alexander Cunnynghame, the respondent, is not intitled to retain Michael Ancrum's share of the adventures 1757 and 1758, on account of any debts he has paid for Michael Ancrum on the adventures 1760 and 1762; and remit to the Lord Ordinary to proceed accordingly."

Mar. 7. 1767.

That as the sum in dispute is considerable, and the judgement of importance in point of precedent, the petitioner will be forgiven for submitting the case to review.

The late Michael Ancrum having formed a plan, and settled a correspondence, for carrying on a foreign trade between Leith, the Madeiras, and Jamaica, and his own funds not being sufficient for so extensive an undertaking, applied to the petitioner to take a concern with him; to which the petitioner agreed, as he was much connected with Mr Ancrum, and very desirous to serve him: and with this view they purchased several shares, first of one ship, and then of another, called *The Edinburgh*, to be employed in that trade.

Four different voyages were performed in the course of this trade; the first in 1757, in which Ancrum, the petitioner, and Thomas Murray shipmaster, were equally concerned; another in 1758, in which Ancrum and the petitioner were three eighths, and Murray one fourth; another in 1760, in which Ancrum, the petitioner, Mr Ronaldson of Blairhall, and Mr John Maclean merchant in Kingston, were equally concerned. The last voyage was in 1762, and in it Ancrum and the petitioner only were concerned.

Mr Ancrum died in March 1762; having named by disposition the petitioner, and several others, his trustees; who appointed the petitioner their factor.

Before Mr Ancrum's death, effects had been remitted to him

him from Jamaica, to account of the adventures 1757, 1758, and 1760, which effects Mr Ancrum sold to certain persons, who were debtors for the price at his death.

In February 1763, after Mr Ancrum's death, effects were remitted from Jamaica, on account of the adventures 1758, 1760, and 1762, directly to the petitioner himself, as surviving partner; and there was a quantity of rum in Mr Ancrum's cellars, of which the petitioner disposed.

Soon after Mr Ancrum's death, Thomas Kinnear, and others, who had furnished the goods sent out on the voyages 1760 and 1762, being impatient for their money, and unwilling to wait for the returns from abroad, brought an action in this court against the petitioner, as being a proper *socius* or partner with Ancrum in these two voyages 1760 and 1762, and as such, liable jointly and severally with him for the price of the goods furnished.

The petitioner did not dispute these gentlemen would be preferable on the proceeds of the goods themselves, but he founded his defence on the distinction between a joint adventurer and a proper copartner, as he contended he was the first, and not the last, seeing there had been no contract of copartnery or firm between him and Mr Ancrum, and as the creditors had furnished the goods to Mr Ancrum upon his own credit.

The furnishers, on the other hand, maintained, That there had been a society entered into *rebus ipsis et factis*: That Mr Ancrum and the petitioner were generally understood to be copartners, in consequence of which Mr Ancrum's credit had been very extensive. And for proof of their being in copartnery, they referred to various letters, invoices, and entries in Mr Ancrum's books, and others, which it is unnecessary at present to state. It is sufficient to say, that they prevailed in that question against the petitioner, the Lord Auchinleck Ordinary having "found it fully instructed, that the defender July 27. &
Dec. 1. 1763.

" Alexander Cunnyngame was concerned as a partner in
" the

“ the different adventures which gave rise to the questions in
 “ debate. Found it also instructed, That the furnishings of
 “ goods, and the different insurances libelled on by the pur-
 “ suers, were made and brought to the account or use of the
 “ company, wherein Mr Cunnyngame was a partner. And
 “ found it also instructed, That Michael Ancrum, now decea-
 “ sed, in purchasing the goods, in ordering the insurances,
 “ and in receiving the returns of the goods sent abroad,
 “ and recovering the insurances, acted as *præpositus negotiis*
 “ of the said company, and not in his own name only; and
 “ that the engagements he came under for behoof of the said
 “ company, affect the company as a copartnery-debt, and
 “ Mr Cunnyngame as a partner.” Which interlocutor was
 adhered to by your Lordships; and, upon an appeal, the
 judgement was affirmed: in consequence of which the peti-
 tioner was obliged to advance very large sums to these credi-
 tors, remittances from abroad having been prevented by the
 death of Mr John Maclean, and other accidents; though it
 is morally certain, that, in time, Mr Ancrum’s effects will
 yield more than will pay all his debts.

As the petitioner never understood himself to be a proper
 partner, what money he received after Mr Ancrum’s death,
 and before Kinnear, &c. brought their process, he dischar-
 ged as factor for the trustees; and the receipts granted by
 him during the dependence of the process are in the same
 terms, and for the same reason; but after the process was
 concluded, and the character of partner fixed upon him, he
 granted no more receipts in that manner; though the cre-
 ditors were pleased to alledge, that he had granted receipts
 in that way, both before and *after* the process. That he did
 so before the process, and during its dependence, is true;
 nor could he do otherwise, consistently with his defence: but
 it is a mistake that he did so after the process was ended, and
 he found a partner; for from that period he discharged in
 his own right.

Several persons, mere private personal creditors of Michael
 Ancrum,

Ancrum, some of whom, such as Mr Kinnear, were pursuers in the first process already mentioned, brought an action against Mr Ancrum's trustees, and the petitioner as their factor, as supposing them to have funds in their hands sufficient to pay the debts due them. The trustees, on the other hand, insisted in a multiple-poinning; which processes were conjoined before Lord Auchinleck. The petitioner's accounts of his intromissions were made up on supposition that he was intitled to apply what he had received of the proceeds of the adventures 1757 and 1758 for reimbursement of the great sums he had advanced, in consequence of the decree of this court, to the furnishers to the adventures 1760 and 1762. To this method of accounting the creditors objected, That the four voyages were separate and unconnected; that the judgement of this court, finding the petitioner a partner, only applied to the voyages 1760 and 1762; and therefore, though they admitted he was intitled to apply the proceeds of the adventures 1760 and 1762 for his reimbursement of what he had paid on account of these adventures, yet they denied he was intitled to apply the proceeds of 1757 and 1758 to that purpose. The Lord Ordinary repelled the objection; your Lordships sustained it; and in the memorials before your Lordships, a separate answer for the petitioner was chiefly canvassed, Whether the petitioner, who was *de facto* in possession of the money, was intitled to retain the same?

For the petitioner's answers to the objection are two: 1st, That the several adventures ought not to be considered as distinct or unconnected. And, 2^{dly}, Supposing they were, yet the petitioner is at least a private creditor to Michael Ancrum; and as he is *de facto* in possession of the proceeds of the adventures 1757 and 1758, he must be intitled to retain these proceeds to what extent he is creditor to Mr Ancrum.

As to the *first* point: As the petitioner was decreed to pay

a very large sum of money to the furnishers to the adventures 1760 and 1762, upon this medium, founded on by these creditors, and sustained by the court, That he was a partner in that foreign trade with Mr Ancrum, he submits, if after that it would be just or equitable to hold the different voyages performed in the course of that trade as distinct and unconnected; for that is allowing the creditors of Mr Ancrum to distress the petitioner by inconsistent and contradictory pleas. They contended he was liable for the furnishings to the adventures 1760 and 1762, because the adventures were so connected as to amount to a copartnery; and now they contend, that he should not draw his relief from the proceeds of the adventures 1757 and 1758, because the adventures were quite separate and unconnected. This is precisely reversing their former argument; and, with submission, a very hard and unreasonable demand, as it is making the medium of the petitioner's distress broader than that of his relief, which surely ought to be commensurate.

It is very true, that the judgement of this court, in the first process, only extended to the adventures 1760 and 1762; but the reason of this was, that the pursuers of that process were only furnishers to the two last voyages, but not creditors-furnishers to the adventures 1757 and 1758, there being nothing due upon them. But it is plain, from a parity of reason, that if there had, the furnishers to the adventures 1757 and 1758 would have had as good a claim against the petitioner as the furnishers to the adventures 1760 and 1762; and the petitioner would have undoubtedly been found liable to them all; and therefore the creditors who admit the petitioner's preference on the proceeds of the adventures 1760 and 1762, for his relief as to the sums he paid to the furnishers, cannot fairly dispute his preference also upon the proceeds of the adventures 1757 and 1758, for his relief of the sums paid to the furnishers to the adventures 1760 and 1762.

And

And here the petitioner must observe, whatever the creditors may now pretend, in the former process the style and strain of all their papers, and the basis of their whole argument, was laid upon the petitioner's connection with Mr Ancrum, and his being concerned with him from his first outset in trade. Thus, in their answers to the petition reclaiming against Lord Auchinleck's interlocutor above inserted, they set forth, " That the now deceased Michael Ancrum was distantly related to Mr Cunnyngame, to whom he was also bound an apprentice in his business as a writer; and Mr Cunnyngame was by that time engaged, with several people in Edinburgh and Glasgow, in a trade from Leith to Jamaica and Carolina, which was managed solely by him. He found Michael Ancrum a young man of parts and application, who, if properly instructed, might in time relieve him of the trouble attending the management of that foreign trade. Hence, about the end of Michael Ancrum's apprenticeship, Mr Cunnyngame resolved to alter the plan of his education; and accordingly sent him over, for his instruction in trade, to Mr Rutherford, a merchant at Cape Fear, where he remained for several years.

" In the end of the year 1755, Michael Ancrum returned to Edinburgh; where he commenced merchant, bought a share of a ship, in which Mr Cunnyngame was then an owner, and from thenceforth was jointly concerned with Mr Cunnyngame in all his foreign trade, especially to Madeira and Jamaica: and although Ancrum had afterwards some private adventures, and had also a copartnery-concern with Alexander Duncan in Cape Fear, North Carolina; yet he never was in any copartnery-trade to those islands, but where the petitioner was of the company. Further, Mr Cunnyngame devolved upon him the entire management of his and the other partners concerns in that trade; so that he was, in the strictest sense of the word,

“ word, *præpositus negotiis* for them, and was notourly known
 “ and understood to be such by those they dealt with; par-
 “ ticularly by the respondents, and other merchants in E-
 “ dinburgh: and soon after he came home, and entered to
 “ this management, Mr Cunnyngname introduced him to
 “ the respondent Mr Kinnear; and told Mr Kinnear he
 “ was for the future to receive his orders from Mr An-
 “ crum.” And this consideration seemed to have consider-
 able influence in determining that cause.

But, 2^{dly}, and separately, Supposing this argument not to be solid, the petitioner's second ground of retention seems to be invincible; for he is surely at least a private creditor to Mr Ancrum for what he has paid to the furnishers to the adventures 1760 and 1762, over and above his own proportion. Now, *de facto*, he is in possession of part of the proceeds of the adventures 1757 and 1758; why then, supposing these proceeds to have been Mr Ancrum's own private money, should not the petitioner be allowed to retain it? Such retention would be good to him in a question with Mr Ancrum himself, and of course must be good to the petitioner in a question with his antagonists in this process, who are not company, but private creditors to Mr Ancrum, and creditors who have done no sort of diligence, by arrestment or otherwise, to give a colour for saying that a *medium impedimentum* had intervened, for which indeed the petitioner cannot figure that ever there could be *termini habiles*.

It is evidently impossible to make any other answer to this, than that the petitioner had obtained possession in such a manner as to exclude him from the plea of retention: and he has no occasion to dispute but that cases might be imagined, in which a creditor who has got possession of his debtor's money would nevertheless be barred from retention, *e. g.* if he has got possession of the money in consequence of a

a spuilzie or a deposit; for in either of these cases the debtor might with reason insist that he was *ante omnia restituendus*.

Accordingly this is the ground which the creditors have at last taken up, pretending that the petitioner received the money, and granted discharges therefor, in the character of factor for the trustees.

But when the petitioner's situation is attended to, there will appear to be nothing in this.

When he received the money in question, he had two titles in his person; 1st, A factory from the trustees; and, 2^{dly}, A better and preferable title, as the only surviving partner; for both Murray and Maclean were by this time dead. Mr Ronaldson of Blairhall, it is true, was alive; but he was only concerned in the adventure 1760, as to which there is no dispute. It is true, that before and during the dependence of the process, the petitioner did not think he was a partner, and would not and could not admit himself to be so; but it is as true, that he has been found to have been in the wrong, both by this court and the house of Lords, who have fixed that character upon him, and decreed him to pay very large sums in consequence of it. Therefore it is evident, that at the time of receiving the money in question, the petitioner had the character of surviving partner in him, though he himself erroneously thought otherwise.

Now, nothing is more certainly established in law, than that he who has two titles of possession, though he enters to it only upon one of them, may notwithstanding maintain and support himself in that possession on the other.

The petitioner likewise apprehends, there is nothing more certainly established in law and practice, than that the surviving partner has a title to the possession of the company-effects, and the recovery of the company-debts, in preference and exclusion of the creditors of any particular partner, when their *bona et nomina* were undivided, as was the case

* C

here;

here; society no doubt is entered into from a *dilectus personæ*: and therefore, upon the death of a partner, though the society may be so far dissolved, as that his heir does not become a *socius* in his place; and can only claim from the surviving partner his predecessor's share of the stock; yet as no stock is understood but *deductis debitis*, and as the surviving partner is liable for the whole debts, he must have a power of uplifting and holding the company's money, till the whole debts are collected or paid off. And the strangest consequences and most insufferable inconveniencies would follow, were it otherwise. The debtors of the company can only pay to the company; they are not debtors to the creditors of any partner; and such creditor, to affect a partner's share, must arrest, not in the hands of the debtors to the company, but of the company itself; and a debtor to the company, who is creditor to one of the partners, cannot plead compensation or retention against the company upon a debt due to him by one of the partners.

Therefore the petitioner's having granted discharges as factor for the trustees, cannot prejudice his right of retention, because he had at the same time in his person the title of surviving partner. His reason and his excuse for ascribing his intromission to the weaker title of factor for the trustees, and not to the better title of surviving partner, was, that the latter would have been incompatible with, and a departure from, his defence in the process then depending with Ancrum's creditors: But since it has been found, at the instance of these creditors, that he was a partner at that time, it is clear that he had then another and a better title to uplift the money than his factory from the trustees; and if he had a better title then to uplift that money, that title must be good now to the effect of enabling him to retain it, though originally uplifted upon a title that would not have enabled him to retain it. *Qua* factor for the trustees

trustees he might be obliged to yield the possession, but *qua* surviving partner he is intitled to retain it; because his granting discharges as factor for the trustees, could never import or imply a renunciation of his right *qua* partner; a character which he did not believe to be in him at the time, and which has been since fixed upon him against his will. His title of surviving partner gave him a preferable right to the possession against every mortal. If he had not yet received the money, but it was still in the hands of the debtors, he would have a preferable right to the possession in the question with the trustees, or the creditors of his partner Ancrum; and if he would at this moment have a preferable right to receive or sue for the recovery of this money, *multo magis* must he have a title to retain it, though he had originally entered into possession by a title that would not have intitled him to retain it.

For these reasons the petitioner is hopeful your Lordships will alter the interlocutor now under review. However, it is proper here to observe, that in case it should be affirmed, it should be restricted to what sums he received as factor for the trustees; because, if the judgement remains in general terms, it may be pretended that it would exclude him from applying what part of the proceeds of the 1757 and 1758 he received and discharged in his own right, as well as those which are yet unremitted; as also be extended to two sums which the petitioner received after Michael Ancrum's death, and discharged in consequence of indorsations by Mr Ancrum before his death, to two bills, in which part of the proceeds of 1758 was included.

This indeed is thought would be entire to him before the Lord Ordinary, though the judgement shall be adhered to; but he imagined it was proper to mention it here, though he is humbly confident, for the reasons above suggested, the interlocutor will be altered altogether.

May

May it therefore please your Lordships, to review your former interlocutor; and to find, that the petitioner is intitled to apply the proceeds of the adventures 1757 and 1758 to reimburse him of the advances he was obliged to make on the adventures 1760 and 1762.

According to justice, &c.

JO. MACLAURIN.

For these reasons the petitioner is hopeful your Lordships will after the interlocutor now under review. However, it is proper here to observe, that in case it should be affirmed, it should be subject to what has been received as factor for the trustees; besides, if the judgement remains in general terms, it may be pretended that it would exclude him from applying what part of the proceeds of the 1757 and 1758 he received and discharged in his own right, as well as those which are yet unremitted as they are extended to two times which the petitioner received after Michael Anan's death, and discharged in consequence of instructions by Mr. Anan before his death, to two parts in which part of the proceeds of 1758 was included. This indeed is thought would be entire to him before the Lord Ordinary, though the first part shall be added to; but he imagined it was proper to mention it here, though he is hardly conscious, for the reasons above suggested, the interlocutor will be signed altogether.

